

HONORABLE JAMES L. ROBART

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICROSOFT CORPORATION,

Plaintiff,

v.

MOTOROLA, INC., et al.,

Defendants.

No. C10-1823-JLR

MICROSOFT'S 8/6/12 MOTION TO
FILE DOCUMENTS UNDER SEAL

**NOTED FOR:
Friday, August 17, 2012**

MOTOROLA MOBILITY, INC., et al.,

Plaintiffs,

v.

MICROSOFT CORPORATION,

Defendant.

I. RELIEF REQUESTED

Pursuant to Local Civil Rule 5(g) and paragraphs 2(a) and 8 of the protective order entered in this case, Microsoft respectfully seeks leave to file under seal the following documents:

- (1) Limited Portions of Microsoft's Opposition to Motorola's Motion for Partial Summary Judgment Dismissing Microsoft's Claim for a RAND Patent License Agreement to be Determined *Ab Initio* by the Court ("Microsoft's Opposition to Motorola's PSJ Motion"); and

MICROSOFT'S 8/6/12 MOTION TO FILE
DOCUMENTS UNDER SEAL - 1

No. C10-1823

LAW OFFICES
DANIELSON HARRIGAN LEYH & TOLLEFSON LLP
999 THIRD AVENUE, SUITE 4400
SEATTLE, WASHINGTON 98104
TEL., (206) 623-1700 FAX, (206) 623-8717

(2) Exhibit 12 to the Declaration of Christopher Wion in Support of Microsoft's Opposition to Motorola's PSJ Motion (the "8/6/12 Wion Declaration").

Microsoft seeks to file the foregoing materials under seal because they contain information that has been identified by either Microsoft or Motorola as confidential business information under the terms of the operative protective order issued in this case and/or in separate litigation between the parties.

For these reasons, and as more fully described below, compelling reasons exist for protecting the confidentiality of these documents. Microsoft respectfully requests that the Court direct such documents to remain under seal. Microsoft is filing a redacted version of its Opposition to Motorola's PSJ Motion as part of the public record.

II. FACTS & AUTHORITY

A. The Operative Protective Order and Applicable Court Rules Permit Microsoft to File Confidential Information under Seal.

Pursuant to the Protective Order issued by the Court on July 21, 2011, Microsoft is permitted to file materials designated by either party as Confidential Business Information¹ under seal, with such documents to remain under seal upon Court approval. Paragraphs 2(a) and 8 of the Protective Order govern the filing of documents under seal. Paragraph 2(a) provides:

Any information submitted in pre-trial discovery or in a pleading, motion, or response to a motion in this action, either voluntarily or pursuant to order, and which is asserted by a supplier to contain or constitute Confidential Business Information shall be so designated by such supplier in writing...and shall be segregated from other information being submitted. Documents shall be clearly and prominently marked on their face with the legend: "[SUPPLIER'S NAME] CONFIDENTIAL BUSINESS INFORMATION, SUBJECT TO PROTECTIVE ORDER" or a comparable notice. During the pre-trial phase of this action, such information, whether submitted in writing or in oral testimony,

¹ "Confidential Business Information" is defined in the parties' Protective Order as "information which has not been made public and which concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the production, sales, shipments, purchases, transfers, identification of customers, inventories, amounts or source of any income, profits, losses, or expenditures." Protective Order Regarding the Disclosure and Use of Discovery Materials (ECF No. 72), ¶1.

1 shall be disclosed only *in camera* before the Court and shall be filed only under
 2 seal, pursuant to Rule 5(g) of the Local Civil Rules of the United States District
 Court for the Western District of Washington.

3 Paragraph 8 likewise provides that:

4 Any Confidential Business Information submitted to the Court in connection
 5 with a motion or other proceeding within the purview of this action shall be
 submitted under seal pursuant to paragraph 2 above.

6 *Id.*, at ¶ 8.

7 The Federal Rules of Civil Procedure recognize that courts may permit parties to file
 8 “trade secrets or other confidential research, development, or commercial information” under
 9 seal. Rule 26(c)(1)(G) and (H). District courts “are in the best position to weigh the fairly
 10 competing needs and interests of the parties affected by discovery,” in crafting the appropriate
 11 treatment of documents for which protected treatment is requested. *Seattle Times Co. v.*
 12 *Rhinehart*, 467 U.S. 20, 36, 104 S. Ct. 2199 (1984); *see also Phillips v. General Motors Corp.*,
 13 307 F.3d 1206, 1211-1212 (9th Cir. 2002).

14 Additionally, pursuant to Local Rule CR 5(g)(2), the Court may seal a document filed in
 15 support of a dispositive motion upon a “compelling showing that the public’s right of access is
 16 outweighed by the interests of the public and the parties in protecting the court’s files from public
 17 review.” *Id.*; *see also Kakakama v. City and Cnty of Honolulu*, 447 F.3d 1172, 1179 (9th Cir.
 18 2006). In determining whether compelling reasons exist, the Court weighs relevant factors such as
 19 “the public interest in understanding the judicial process and whether disclosure of the material
 20 could result in improper use of the material for scandalous or libelous purposes or infringement
 21 upon trade secrets.” *Dish Network, L.L.C. v. Sonicview USA, Inc.*, 2009 U.S. Dist. LEXIS 73857,
 22 *2-3 (S.D. Cal. Aug. 20, 2009), *citing Pintos v. Pac. Creditors Ass’n*, 565 F.3d 1106, 1116 n.6
 23 (9th Cir. 2009). Where the material sought to be sealed “includes information about
 24 proprietary business operations, a company’s business model or agreements with clients, there
 25 are compelling reasons to seal the material because possible infringement of trade secrets

1 outweighs the general public interest in understanding the judicial process.” *Selling Source,*
 2 *LLC v. Red River Ventures, LLC*, 2011 U.S. Dist. LEXIS 49664, 18 (D. Nev. Apr. 29, 2011).

3 Further, while the public generally enjoys a right to inspect and copy public records, “it
 4 is uncontested ... that the right to inspect and copy judicial records is not absolute. Every court
 5 has supervisory power over its own records and files, and access has been denied where court
 6 files might have become a vehicle for improper purposes.” *Nixon v. Warner Communications,*
 7 *Inc.*, 435 U.S. 589, 598, 98 S. Ct. 1306 (1978). As the Court recognized, one such “improper
 8 purpose” is where the commercial business information at issue is sought to be used as a
 9 “source[] of business information that might harm a litigant’s competitive standing.” *Id.*
 10 (denying access to copies of tapes played at trial and noting that courts refused public access to
 11 their files where granting such access might “become a vehicle for improper purposes,”
 12 including causing a litigant competitive harm). Compelling reasons exist to grant Microsoft’s
 13 motion to seal.

14 **B. Compelling Reasons Exist for Filing and Maintaining under Seal Documents that**
 15 **Disclose Non-Public and Commercially Sensitive Information.**

16 1. Exhibit 12 to the 8/6/12 Wion Declaration Should Be Maintained under Seal

17 Exhibit 12 to the 8/6/12 Wion Declaration is a true and correct copy of an excerpt from
 18 the Expert Report of Charles R. Donohoe (the “Donohoe Report”). Mr. Donohoe is one of
 19 Motorola’s experts in this action. Motorola has designated the Donohoe Report as containing
 20 “Confidential Financial Information – Outside Attorneys’ Eyes Only – Subject to Protective
 21 Order.” The excerpt from the Donohoe Report comprising Exhibit 12 also includes extensive
 22 references to the Expert Report of Michael J. Dansky (the “Dansky Report”). Mr. Dansky is
 23 another of Motorola’s experts in this action. Motorola has designated the Dansky Report as
 24 “Highly Confidential – Attorneys’ Eyes Only.” Accordingly, under the terms of the Protective
 25 Order, Microsoft is required to file Exhibit 12 under seal.

1 Additionally, Exhibit 12 should remain under seal because it discloses non-public and
 2 commercially sensitive information regarding each party's products that implement either the
 3 H.264 video coding standard or the 802.11 wireless standard. Much of the detailed financial,
 4 technical, and marketing information contained in Exhibit 12 is not generally known to the
 5 public or to the parties' competitors. Public disclosure of the business information contained
 6 in Exhibit 12 would create an unreasonable risk of commercial harm to Microsoft without any
 7 countervailing benefit to the public. Based on the foregoing, compelling reasons exist to
 8 maintain Exhibit 12 under seal.

9 2. Microsoft's Opposition to Motorola's PSJ Motion Includes References to Confidential
 10 Information Contained in Exhibit 12, which Should Be Redacted

11 Microsoft's Opposition to Motorola's PSJ Motion includes references to and
 12 descriptions of the confidential information contained in Exhibit 12 to the 8/6/12 Wion
 13 Declaration. To the extent that the Court determines that Exhibit 12 should remain under seal,
 14 a redacted version of Microsoft's Opposition to Motorola's PSJ Motion should be filed as part
 15 of the public record to avoid disclosure of the confidential information contained therein.
 16 Microsoft is seeking to file under seal only those limited portions of its Opposition Brief that
 17 contain information that should be protected from public disclosure under the governing
 18 standards outlined above. While an unredacted version of Microsoft's Opposition Brief is
 19 being filed under seal, Microsoft is filing a redacted version as part of the public record.

20 **III. CONCLUSION**

21 Microsoft has filed the above-referenced documents under seal based on its good faith
 22 belief that such material qualifies for protection under the terms of the Protective Order and the
 23 applicable court rules. A [Proposed] Order Granting Microsoft's 8/6/12 Motion to File
 24 Documents under Seal has been submitted herewith.

1 DATED this 6th day of August, 2012.

2 DANIELSON HARRIGAN LEYH & TOLLEFSON LLP

3
4 By s/ Arthur W. Harrigan
Arthur W. Harrigan, Jr., WSBA #1751
5 Christopher Wion, WSBA #33207
Shane P. Cramer, WSBA #35099

6
7 s/ T. Andrew Culbert
T. Andrew Culbert, WSBA #35925
8 David E. Killough, WSBA #40185
MICROSOFT CORPORATION
9 1 Microsoft Way
Redmond, WA 98052
10 Phone: 425-882-8080; Fax: 425-869-1327

11 David T. Pritikin, *Pro Hac Vice*
12 Richard A. Cederroth, *Pro Hac Vice*
Douglas I. Lewis, *Pro Hac Vice*
13 John W. McBride, *Pro Hac Vice*
SIDLEY AUSTIN LLP
14 One South Dearborn
Chicago, IL 60603
15 Phone: 312-853-7000; Fax: 312-853-7036

16 Brian R. Nester, *Pro Hac Vice*
SIDLEY AUSTIN LLP
17 1501 K Street NW
Washington, DC 20005
18 Telephone: 202-736-8000; Fax: 202-736-8711

19 Counsel for Microsoft Corporation
20
21
22
23
24
25

CERTIFICATE OF SERVICE

I, Linda Bledsoe, swear under penalty of perjury under the laws of the State of Washington to the following:

1. I am over the age of 21 and not a party to this action.
2. On the 6th day of August, 2012, I caused the preceding document to be served on counsel of record in the following manner:

Attorneys for Motorola Solutions, Inc., and Motorola Mobility, Inc.:

Ralph Palumbo, WSBA #04751
Philip S. McCune, WSBA #21081
Lynn M. Engel, WSBA #21934
Summit Law Group
315 Fifth Ave. South, Suite 1000
Seattle, WA 98104-2682
Telephone: 206-676-7000
Email: Summit1823@summitlaw.com

____ Messenger
____ US Mail
____ Facsimile
 X ECF

Steven Pepe (*pro hac vice*)
Jesse J. Jenner (*pro hac vice*)
Ropes & Gray LLP
1211 Avenue of the Americas
New York, NY 10036-8704
Telephone: (212) 596-9046
Email: steven.pepe@ropesgray.com
Email: jesse.jenner@ropesgray.com

____ Messenger
____ US Mail
____ Facsimile
 X ECF

Norman H. Beamer (*pro hac vice*)
Ropes & Gray LLP
1900 University Avenue, 6th Floor
East Palo Alto, CA 94303-2284
Telephone: (650) 617-4030
Email: norman.beamer@ropesgray.com

____ Messenger
____ US Mail
____ Facsimile
 X ECF

1 Paul M. Schoenhard (*pro hac vice*)

2 Ropes & Gray LLP

3 One Metro Center

4 700 12th Street NW, Suite 900

5 Washington, DC 20005-3948

6 Telephone: (202) 508-4693

7 Email: Paul.schoenhard@ropesgray.com

____ Messenger

____ US Mail

____ Facsimile

X ECF

8 DATED this 6th day of August, 2012.

9 s/ Linda Bledsoe

10 LINDA BLEDSOE